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No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case concerns a challenge to the efforts of the Federal Communications Commission (FCC or Commission) to regulate indecent broadcast communications that come "directly into the home, the place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds," *FCC* v. *Pacifica Found.*, 438 U.S. 726, 759 (1978) (*Pacifica*) (Powell, J., concurring in part and concurring in the judgment), and can "enlarge[] a child's vocabulary in an instant," *id.* at 749. The court of appeals held that the FCC's new policy concerning the use of expletives is "arbitrary and capricious under the Administrative Procedure Act," and therefore invalid. Pet. App. 2a. In that court's view, the Commission failed to provide an adequate explanation for abandoning a per se rule that had attached dispositive weight to one factor—whether an expletive

was repeated—and in its place adopting a consistent enforcement policy that depends on a careful evaluation of context.

Respondents spend little time attempting to defend the reasoning of the court of appeals on the APA issue it decided. Instead respondents argue, incorrectly, that the Commission failed to acknowledge its change in policy, and they advance a revisionist view of both the old policy and the new policy that is inconsistent not only with the opinion below but also with arguments they have advanced at earlier stages of this litigation. To the extent that they actually address the reasoning of the court of appeals, they repeat its error of focusing on the Commission's analysis of broadcasts that are not before the Court—many of which do not involve isolated expletives at all—rather than its decision with respect to the broadcasts actually at issue here. Conspicuously absent from respondents' briefs is any effort to defend the use of the F-Word and the S-Word in the broadcasts at issue—prime-time awards shows viewed by substantial numbers of children—or to explain why the broadcasts were not patently offensive.

Respondents advance a variety of constitutional arguments against 18 U.S.C. 1464 and the Commission's enforcement of it. Because those arguments were not passed upon below, there is no need for the Court to consider them now and, indeed, doing so would contravene the rule that the judgment may not be altered in favor of a respondent that has not filed a cross-petition. That response is not, as respondents suggest (NBC Br. 15), a "bait-and-switch" on the Commission's part. In seeking certiorari, the Commission specifically stated that "[p]etitioners seek a ruling only on the APA issues addressed by the court below." Reply Br. 10. Accord-

ingly, consistent with the restraint that this Court ordinarily exercises when it can resolve a case on non-constitutional grounds, the Court should resolve the administrative-law issue decided below and then remand to allow the court of appeals to consider respondents' remaining arguments.

As respondents acknowledge (NBC Br. 13), this case in large measure concerns the "well-being of children" exposed to indecent programming broadcast into their homes. The First Amendment does not confine the FCC to the role of protecting children from only that indecent broadcast material which is "intentionally repeated 'over and over'" again (Fox Br. 15). And, as the briefs filed by respondents' amici underscore (see ACLU Br. 29-32), respondents' view of the Constitution would create a world in which children could be bombarded with indecent broadcast material (fleeting or not) during prime time viewing hours—and, indeed, 24/7. There would be no basis for the Court to adopt such an unsettling regime in a case squarely presenting respondents' audacious constitutional challenge, and there is certainly no reason for the Court to do so here, in reviewing a decision grounded on an erroneous application of statutory administrative-law principles.

A. Respondents Misread The FCC's Orders

Respondents make only a limited effort to defend the reasoning of the court of appeals. Instead, they advance a number of arguments that are inconsistent with the court's opinion—and, in some cases, with the positions they took below—and that rest on serious misinterpretations of the Commission's orders. None of respondents' arguments in this vein withstands scrutiny.

1. Respondents first insist (Fox Br. 16, 36; NBC Br. 48-49) that the Commission has denied changing its policy. The claim is inconsistent not only with the decision below but also with other portions of respondents' briefs in which they discuss the Commission's rationale for the change. See, *e.g.*, Fox Br. 28-29. Indeed, as the court of appeals itself explained, the Commission's orders left "no question that the FCC has changed its policy." Pet. App. 20a. The court quoted a paragraph of the order in which the Commission discussed the change, and it observed that the Commission had declined to issue a forfeiture because it recognized that the broadcasts in this case would have been permitted under agency precedent. *Id.* at 21a-22a (citing *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) (*Golden Globe Awards Order*)).

Respondents' argument is also contradicted by the passages in the Commission's order describing as "seriously flawed" the Commission's earlier decisions stating "that expletives had to be repeated to be indecent," and "reaffirm[ing] that it was appropriate to disavow" those decisions. See Pet. App. 82a; see also *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12. In addition, respondents overlook the fact that the Commission did not sanction Fox for either broadcast at issue here. And the only reason for its forbearance, in the case of the 2002 Billboard Music Awards, was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 124a & n.206.

2. Respondents also assert (Fox Br. 19, 26; NBC Br. 53) that the Commission did not have a per se rule against liability for isolated expletives. As the court of

appeals explained, however, "prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime." Pet. App. 20a. The networks themselves urged that conclusion in their Second Circuit briefs. See Fox C.A. Br. 21 ("For 30 years following *Pacifica*, the FCC respected the narrowness of *Pacifica* by repeatedly reaffirming that isolated or fleeting expletives were not punishable."); NBC C.A. Br. 39 ("[T]he Commission expressly rejected the notion that broadcasters could be held liable for a single word."); CBS C.A. Br. 4. And in opposing certiorari, Fox reiterated that, "[f]or almost 30 years following *Pacifica*, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent." Fox Br. in Opp. 4.

Although the Commission has long stressed the importance of context in indecency determinations, see *In re Infinity Broad. Corp. of Penn.*, 3 F.C.C.R. 930 (1987), its old policy was to depart from a contextual analysis when evaluating isolated expletives. In that setting, one factor—the fact that the expletive was not repeated—was dispositive. The Commission clearly expressed that policy in 1987 when it stated: "If a complaint focuses solely on the use of expletives, we believe that * * * deliberate and repetitive use in a patently offensive manner is a *requisite* to a finding of indecency." *In re Pacifica Found.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (emphasis added). By contrast, the Commission explained, "[w]hen a complaint goes beyond the use of expletives, * * * repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.* Fox does not cite any Commission decision predating the *Golden Globe Awards Order* that renounces the

1987 per se exclusion of isolated expletives or that finds an isolated expletive to be indecent.[1]

3. Respondents mischaracterize not only the Commission's old policy but also its new one. Fox asserts (Br. 27) that under the Commission's new approach, certain words are presumed indecent unless the FCC can identify factors that mitigate the language's offensiveness. In support of that theory, Fox relies on the passage in the *Golden Globe Awards Order* in which the Commission stated that any use of the F-Word "in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." 19 F.C.C.R. at 4978 ¶ 8. But that statement simply means that any use of the F-Word falls within the subject-matter scope of the indecency definition in that it "describe[s] or depict[s] sexual or excretory organs or activities." *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8002 ¶ 7 (2001) (*Industry Guidance*). That is only the first component of the indecency test. To be indecent, material must also satisfy the second component of the test: it "must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8. (emphasis omitted). In applying that component of the test, "the *full context* in which

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[1] In *CBS Corp.* v. *FCC*, 535 F.3d 167 (2008), the Third Circuit held that, until the *Golden Globe Awards Order*, "the FCC's policy was to exempt fleeting or isolated *material* from the scope of actionable indecency." *Id.* at 180 (emphasis added). The Third Circuit's description of the Commission's policy was inaccurate, because, as shown above, the policy did not extend to all fleeting "material," such as images. But for pertinent purposes, the prior policy did exempt isolated *expletives* from indecency regulation.

the material appeared is critically important," and the inquiry is "highly fact-specific." *Id.* at 8002-8003 ¶ 8.

The Commission's evaluation of context focuses on three principal factors: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10 (emphases omitted). NBC errs in asserting (Br. 53-54) that the Commission gives no weight to the second factor in cases involving expletives. Whereas the Commission's old policy made that factor dispositive in *all* isolated expletive cases, the new policy considers it, along with all other relevant factors, in determining whether a broadcast is indecent. Pet. App. 82a-83a.

In the case of the 2002 Billboard Music Awards, for example, the Commission looked to the explicit and graphic nature of the language, the program content as it affected the "composition of the audience," and the rating given to the program. Pet. App. 76a. It also considered whether the material was presented in a pandering or shocking manner, and it determined that it was. *Id.* at 75a. It acknowledged that "the offensive dialogue here was relatively brief," but it concluded that that fact was "not dispositive under these particular circumstances." *Id.* at 86a. Only after weighing all of the "factors in [the] contextual analysis" did the Commission conclude that the broadcast was "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 74a. Fox has not disputed any of the specific findings underlying the Com-

mission's determination, nor has it made any effort to articulate a theory of contemporary community standards under which the gratuitous prime-time broadcast of the F-Word and the S-Word under these circumstances would not be patently offensive.

B. The FCC Gave A Reasonable Explanation For Its Change In Policy

To the extent that they attempt to defend the opinion below, respondents largely repeat the errors of the court of appeals. The Commission's explanation for its change in policy fully satisfied the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the court of appeals erred in second-guessing the agency's considered judgment.

1. The Commission's new policy appropriately takes account of context

The Commission explained that the "most important[]" reason for its change in policy was that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." Pet. App. 83a. The Commission noted that with respect to cases other than those involving isolated expletives, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination." *Ibid.* That explanation, by itself, is sufficient to satisfy the APA's requirement that an agency explain a change of policy. The court of appeals did not address it but instead concluded that the regulation of isolated expletives was irrational because the Commission did not "take the position that *any* occurrence of an expletive is indecent." *Id.* at 26a. Noth-

ing in the APA requires the Commission to adopt the blunt tool of an all-or-nothing policy, and respondents' efforts to defend the court's holding are unavailing.

a. Respondents fail to acknowledge that "[w]ords that are commonplace in one setting are shocking in another," and therefore the offensiveness of certain words depends on context. *Pacifica*, 438 U.S. at 747 (plurality opinion). Nor do they recognize that the Commission is permitted—indeed, required—to balance competing objectives in enforcing its indecency policy. Instead, respondents argue (Fox Br. 29) that consideration of context is irrational because children "cannot distinguish between the use of an expletive in a Shakespearean drama and in an awards show." But this Court itself drew precisely that contextual distinction in *Pacifica* when it contrasted the Carlin monologue with the broadcast of expletives in "an Elizabethan comedy" or a reading of *The Canterbury Tales*. See 438 U.S. at 750 & n.29. As the Court explained, it is unlikely that a performance of Shakespeare or Chaucer would "command the attention of many children who are both old enough to understand and young enough to be adversely affected by" hearing expletives. *Id.* at 750 n.29.

Like much of the reasoning of the court of appeals, respondents' attack on the Commission's evaluation of context is not a criticism of the changed enforcement policy with respect to isolated expletives; it is a criticism of any effort to enforce Section 1464. See Pet. App. 54a (Leval, J., dissenting). Thus, Fox does not even attempt to explain why the comments in the Billboard Music Awards broadcasts were not patently offensive. Instead, in an effort to divert attention from the broadcasts at issue in this case, it complains (Br. 31-33) about the Commission's determinations in other cases that are

not before the Court, do not involve isolated expletives, and arise in different contexts. The logic of Fox's position in discussing those cases is that if expletives are permitted in *any* broadcast, they must be permitted in *every* broadcast.

Respondents' objections about unrelated cases extend even to cases that were resolved in their favor. Before the Commission, CBS argued that the use of an expletive on "The Early Show" should not be considered indecent because "[w]here * * * an isolated expletive is spoken during a *bona fide* news interview, it is not actionable." C.A. App. A720. The Commission agreed that it was appropriate to "proceed with the utmost restraint when it comes to news programming," and it therefore determined that "The Early Show" was not indecent. Pet. App. 127a. But now respondents, including CBS, cite that finding as an example of the Commission's alleged inconsistency. See NBC Br. 7, 26.

Fox goes further and claims (Br. 31) that as a result of the different treatment afforded to an awards show and a news broadcast, "[t]here simply is no way for broadcasters to determine * * * whether and when language will be deemed indecent." But there is no reason to believe that respondents are incapable of distinguishing between a bona fide news show and entertainment programming like the Billboard Music Awards. See Pet. App. 128a (explaining that the Commission will "defer to [a broadcaster's] plausible characterization of its own programming").[2]

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[2] Fox's argument (Br. 32) that consideration of context threatens live programming is also implausible. The Commission cannot impose a penalty without a finding of willfulness or scienter. See 47 U.S.C. 503(b)(1). The Commission made no such finding here, because it did

b. Respondents' criticism of a contextual approach to indecency determinations rests on a misunderstanding of what the consideration of context entails. Fox contends (Br. 33) that the *Pacifica* Court's understanding of context was limited to "the time of the broadcast, the nature of the program, and its likely audience (particularly whether that audience included children)." That is incorrect, as the Court made clear when it explained that context "requires consideration of a host of variables." 438 U.S. at 750. In any event, even if the assessment of context were limited to the factors identified by Fox, the context of these broadcasts would still support the Commission's indecency findings: the broadcasts aired during prime time hours before 10 p.m., the time of day when children are most likely to be in the audience; the broadcasts were awards shows of the kind that many children watch; and there were in fact large numbers of children in the audiences for both broadcasts. Pet App. 99a n.117, 119a.

NBC contends (Br. 20) that the Commission's contextual determinations of patent offensiveness turn on "the Commissioners' individual subjective evaluations of 'artistic merit.'" That is incorrect. Although the phrase "artistic merit" appears in the Commission's order, Pet. App. 76a n.44, 120a n.191, the Commission made no finding as to the merit, or lack thereof, of either of the "Billboard Music Award" broadcasts. Instead, the Commission merely noted that "Fox does not argue that [the] remarks had any artistic merit or were necessary to convey any message." *Id.* at 76a n.44. Therefore, whatever the appropriate role for consideration of artistic merit,

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not impose a forfeiture. Had it attempted to do so, the broadcasters would have been free to argue that they lacked the requisite mens rea.

that issue is not presented in this case, where the use of expletives was concededly gratuitous.

2. The Commission reasonably concluded that vulgar expletives need not be used in a literal sense to be indecent

Fox makes no effort to defend the court of appeals' determination that non-literal uses of expletives fall outside of the subject-matter scope of the indecency definition. Pet. App. 29a-30a. Instead, Fox claims only (Br. 41 n.17) that "the FCC lacked any record evidence" on the point. That is incorrect, as the Commission's order demonstrates. See Pet. App. 74a & nn.39-40, 118a. More importantly, neither Fox nor the other respondents attempts to refute the Commission's determination that the F-Word "has a sexual connotation even if the word is not used literally," *id.* at 74a, and that "the word's power to insult and offend derives from its sexual meaning," *id.* at 118a. Nor do respondents come to terms with the logical implication of the court's reasoning, which is that the Commission would lack the authority to regulate any non-literal uses of offensive sexual or excretory terms, no matter how often they are repeated or what time of day they are broadcast.

NBC argues (Br. 50) that the Commission "has acknowledged that some uses of expletives such as the 'F-Word' do not carry a sexual meaning and therefore often fall outside the subject matter scope of the Commission's indecency definition." That is incorrect. NBC relies on *In re Lincoln Dellar*, 8 F.C.C.R. 2582 (Audio Servs. Div. 1993), but there the Commission's staff determined that a broadcaster's inadvertent use of an expletive did not "warrant further Commission consideration in light of the isolated and accidental nature of the

broadcast." *Id.* at 2585 ¶ 26. Nowhere in the order did the staff consider whether the expletive fell within the subject-matter scope of the indecency definition.

3. The Commission reasonably determined that a change in its enforcement policy was appropriate

The court of appeals believed that the Commission's new policy was unnecessary because "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," Pet. App. 30a, and because the record "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation," *id.* at 32a. As explained in the opening brief, neither of those rationales was an appropriate basis for setting aside the Commission's judgment.

a. Fox does not seem to dispute (Br. 38) the Commission's observation, that, as a matter of logic, a one-free-expletive rule would allow broadcasters to air offensive sexual and excretory terms at any time of day—regardless of the number of children in the audience—so long as they did so one at a time. Yet Fox offers no reason why the Commission should not have been able to consider where the logic of its policies would extend, whether or not the regulated community might exercise self-restraint in the short run. In any event, the Commission identified evidence to support the prediction that the use of expletives might increase in the absence of a change of policy. See *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9 n.26. And Congress had similar evidence before it when, based in part on Fox's broadcast of the 2003 Billboard Music Awards, it enacted the Broadcast Decency Enforcement Act of 2005, Pub. L.

No. 109-235, 120 Stat. 491. See H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005).

b. Fox appears to recognize (Br. 35-38) that there is no basis in the APA for requiring the Commission to identify "evidence" of harm before it may enforce an Act of Congress. Instead, Fox suggests that the First Amendment requires the Commission to amass evidence that expletives are harmful. As explained below, that constitutional argument is not properly before the Court, but in all events, it is foreclosed by *Pacifica*, which upheld the Commission's authority to enforce Section 1464 even without a scientific demonstration of harm caused by the expletives in the Carlin monologue. As the District of Columbia Circuit has explained, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996); see *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968). And as this Court observed in *Pacifica*, the exposure to indecent language can "enlarge[] a child's vocabulary in an instant." 438 U.S. at 749.

C. This Court Should Remand To Allow The Court Of Appeals To Consider Respondents' Other Challenges To The FCC's Order

Respondents ask this Court to consider a variety of far-reaching constitutional challenges to the Commission's order and broadcast-indecency regulation more generally. See Fox Br. 42-50; NBC Br. 15-47. The Court should decline that request and should instead

remand the case to the court of appeals to allow it to consider respondents' arguments in the first instance.

1. Consideration of respondents' constitutional arguments in this case is precluded by the rule that the judgment may not be altered in favor of a respondent that has not filed a cross-petition. That rule is an analog of the rule that "an appellate court may not alter a judgment to benefit a nonappealing party," a rule that the Court has repeatedly described as "inveterate and certain." *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564 (2008) (quoting *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937)); see *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). Respondents suggest (NBC Br. 17-19) that they are simply presenting alternative grounds for affirmance and that they do not seek to alter the judgment below. But the judgment below was a remand to the Commission with instructions to provide a reasoned analysis for its change in policy. Pet. App. 34a, 144a. If, as respondents argue, the Commission's entire "indecency regime is patently unconstitutional" (Fox Br. 43), then these and all other indecency cases should simply be dismissed. Absent a cross-petition, respondents may not convert the judgment of the court of appeals from a remand for further explanation to one directing outright dismissal. See *Board of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970); Eugene Gressman et al., *Supreme Court Practice* § 6.35, at 490-491 (9th ed. 2007).

2. Even if respondents had cross-petitioned, it would be inappropriate to consider their constitutional arguments at this stage. Recognizing that it is "a court of review, not of first view," this Court generally declines to consider arguments that were not passed upon below.

Cutter v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). That prudential rule has particular force in cases like this one where parties ask this Court to reach constitutional questions not decided below. See, *e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564, 585-586 (2002) (remanding to allow the court of appeals to consider various First Amendment challenges to the Child Online Protection Act, 47 U.S.C. 231, and explaining that "[w]hile respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.").

NBC asserts (Br. 16) that the court of appeals has already "addressed [respondents'] challenges on the merits." But the court of appeals explicitly "refrain[ed] from deciding the various constitutional challenges * * * raised by the Networks." Pet. App. 35a. Moreover, although the panel majority offered some "observations" on those challenges, *id.* at 35a-40a, it recognized that its observations were "dicta," *id.* at 35a n.12. And even then, the majority did not actually offer a definitive view of respondents' arguments, but merely suggested that it was "skeptical" of the FCC's position, *id.* at 35a, and "sympathetic" to that of respondents, *id.* at 36a. This Court's practice of reviewing "judgments, not statements in opinions," is especially sound when the statements are so tentatively expressed. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)).

In addition, several features of this case make it a particularly inappropriate vehicle for addressing respondents' constitutional challenges. First, respondents' constitutional arguments amount to an attack on the regulation of broadcast indecency in general, rather

than the specific change in policy at issue. Second, several of respondents' arguments, such as the claim that the "technological and cultural developments of the last 30 years" have undermined *Pacifica* (NBC Br. 35), or that technologies to allow parents to block particular broadcasts would be a less-restrictive alternative to regulation (NBC Br. 43-47), turn on disputed factual issues. Although the Commission has made findings addressing those issues, Pet. App. 105a-112a, this Court would benefit from allowing the court of appeals to review those findings in the first instance. Third, the only broadcaster whose programs are directly at issue in this case is Fox, and it has addressed the constitutional issues only in a cursory fashion (Br. 42-50). See American Acad. of Pediatrics Br. 4 (urging the Court to decide this case based on the APA issue decided below).

3. Respondents contend that the government has invited consideration of their constitutional arguments because it supposedly "*conceded* that this case would not meet certiorari standards apart from the need to consider the Second Circuit's constitutional analysis." NBC Br. 16; see Fox Br. 42-43. NBC goes so far (Br. 15) as to accuse the government of a "bait-and-switch." Those arguments are baseless. The petition for a writ of certiorari focused on the fact that the court of appeals had "fault[ed] the Commission for exercising the contextual judgment that *Pacifica* mandated" and that its decision was "inconsistent with settled principles governing review of agency action." Pet. 14. More to the point, the Commission's reply brief at the petition stage (at 10) specifically stated: "Petitioners seek a ruling only on the APA issues addressed by the court below; this Court could then remand to allow the court of appeals to consider the remaining issues in the case."

Respondents' claim is particularly odd given that three of the networks maintained, at the petition stage, that their constitutional arguments were *not* presented here. In its brief in opposition (at 19), Fox—then joined by CBS and ABC—emphasized that "the Second Circuit did not even reach Fox's additional substantive challenges to the FCC's new indecency regime," and it argued that "even if this Court were to accept this case and reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's * * * constitutional arguments." The networks were correct at the time, and their about-face attempt to encourage this Court to reach momentous constitutional questions that were not decided below should be rejected.

4. Fox suggests (Br. 21-22) that it is necessary for the Court to consider its constitutional arguments because those arguments "undermine the FCC's claim to deference" under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the government does not argue for *Chevron* deference here, because this case is about the reasonableness of the FCC's explanation for its decision to change its enforcement policy, not about the interpretation of a statute. The FCC's interpretation of "indecent," as that term is used in Section 1464, is unchanged from the interpretation that this Court approved in *Pacifica*. Compare Pet. App. 71a, with *Pacifica*, 438 U.S. at 731-732. All that has changed is the Commission's policy in enforcing Section 1464. There is therefore no occasion to accept Fox's suggestion to apply the canon that a statute should be interpreted, when possible, so as to avoid serious doubt as to its constitutionality. In any event, that canon is applicable only when there is one interpretation that raises serious constitu-

tional doubt and another that does not. Here, respondents' constitutional arguments are directed not at the Commission's change in policy with respect to isolated expletives but at the entire regime of broadcast-indecency regulation. See Fox Br. 21 (arguing that "there are serious constitutional objections to the FCC's regulation of indecency at all"). Thus, any constitutional doubt raised by the Commission's new policy would exist equally under the Commission's old policy. For that reason, too, there is no need for the Court to consider respondents' constitutional arguments to resolve the administrative-law issues decided below.

D. The FCC's Enforcement Of Section 1464 Is Constitutional

If this Court does reach respondents' constitutional challenges, it should reject them.

1. a. This Court held in *Pacifica* that the First Amendment does not prohibit the FCC from regulating indecent broadcasting. Despite all their heated rhetoric, respondents do not explicitly ask this Court to overrule *Pacifica*, and there is no basis for the Court to do so. Cf. *Randall* v. *Sorrell*, 548 U.S. 230, 263-264 (2006) (Alito, J., concurring in part and concurring in the judgment).

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. Not only have the broadcast media "established a uniquely pervasive presence in the lives of all Americans," but "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Moreover, "broadcasting is

uniquely accessible to children." *Id.* at 749. Unlike indecent material sold in bookstores and movie theaters, for example, indecent speech broadcast over the air may not "be withheld from the young without restricting the expression at its source." *Ibid.* "[S]ociety's right to protect its children from this kind of speech" provides a particularly strong reason for respecting "everyone's interest in not being assaulted by offensive speech in the home." *Id.* at 760 (Powell, J., concurring in part and concurring in the judgment).

As this Court has held, regulation of the broadcast spectrum, a "scarce and valuable national resource," "involves unique considerations." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984). Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388 (1969); see American Acad. of Pediatrics Br. 4-15. As a result, even where regulation of broadcast speech that "lies at the heart of First Amendment protection" is concerned, the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest, not the least restrictive available. *League of Women Voters*, 468 U.S. at 380, 381.

This Court has recognized the common-sense fact that broadcast indecency poses a direct threat to the well-being of the nation's children. See *Pacifica*, 438 U.S. at 749; *id.* at 757-759 (Powell, J., concurring in part and concurring in the judgment). It cannot reasonably be disputed that the government has a substantial—or, indeed, "compelling"—"interest in protecting the physi-

cal and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). The government's interests in the "well-being of its youth" and in supporting "parent's claims to authority in their own household" can justify "the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 639, 640). And the Court should likewise reject Fox's perverse suggestion (Br. 44-45) that, because American children face a growing threat—with the advancement of technology such as the Internet—of being exposed to harmful speech, there is less of a constitutional justification for protecting them from broadcast indecency.

The FCC's enforcement of Section 1464 is narrowly tailored to promote that vital interest in protecting our children. Radio and television stations are prohibited from broadcasting indecent material only "between 6 a.m. and 10 p.m." 47 C.F.R. 73.3999(b). By channeling indecent broadcasting to times of day in which fewer children are in the audience, but which nonetheless remain accessible to adult viewers and listeners, the Commission permissibly advances the government's interests "without unduly infringing on the adult population's right to see and hear indecent material." *ACT III*, 58 F.3d at 665; see *id.* at 663; *Pacifica*, 438 U.S. at 750 n.28.

Because of *Pacifica*, a generation of American parents has expected that broadcast television (at least before 10 p.m.) will not be indecent. They understand that there is a difference between what is permissible over broadcast television and what is permissible on cable, and they make choices for their children based on that understanding on a daily basis. In short, the regime of

broadcast-indecency regulation upheld in *Pacifica* has "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). This Court should not upset the settled expectations that have developed in the three decades since that decision.

"[E]ven in constitutional cases," *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). There is no such justification here. *Pacifica* "has in no sense proven 'unworkable,'" nor have its factual premises "so changed, or come to be seen so differently, as to have robbed [it] of significant application or justification." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992) (citation omitted). To the contrary, the FCC's findings in this case demonstrate the continuing pervasiveness of broadcast television. Pet. App. 106a-108a; see ACLU Br. 36 ("broadcasting remains pervasive"). As the Commission noted, in 2003, over 98% of households had at least one television, and despite the availability of cable and satellite service, millions of households still rely exclusively on over-the-air broadcasting. *Id.* at 106a-107a. Moreover, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. *Id.* at 108a; cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 190 (1997).

Broadcast media also remain uniquely accessible to children. Two thirds of children aged 8 to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections. Pet. App. 107a-108a. Cable offers parents some choice in their selection of a package of channels, which may enable

them to avoid channels showing programs that, in their judgment, are inappropriate for children. In contrast, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *ACT III*, 58 F.3d at 660. As a result, members of the broadcast audience, unlike consumers of audio and video programming distributed by other means, "are confronted without warning with offensive material." *Ibid.*; see Pet. App. 111a-112a (explaining that "[b]roadcast television is also significantly different from the Internet"). *Pacifica*'s premises remain valid today.

b. NBC contends (Br. 39-43) that, even if other forms of broadcast indecency may be regulated, the First Amendment prohibits the regulation of isolated expletives. That argument finds no support in *Pacifica*, which refrained from deciding whether "an occasional expletive," such as that in "a conversation between a cab driver and a dispatcher," or "a telecast of an Elizabethan comedy," would be sanctionable. 438 U.S. at 750. Nor is there any reason to suppose that the Constitution creates a categorical exemption for all isolated utterances—an exemption under which broadcasters could gratuitously broadcast any number of highly offensive sexual or excretory terms in the middle of the afternoon, so long as they did so one at a time. NBC claims (Br. 41) that its position is supported by *Cohen* v. *California*, 403 U.S. 15 (1971), but while that case did involve a single expletive, it did not involve broadcasting. See *Pacifica*, 438 U.S. at 749 & n.27. Moreover, there is a world of difference between Cohen's "political statement in a public place," *id.* at 747 n.25, and indecent language broadcast directly into one's home.

2. Respondents contend (Fox Br. 48-50; NBC Br. 20-30) that Section 1464 is unconstitutionally vague, but

they have made no effort to show that there is *any* understanding of contemporary community standards that would permit the gratuitous broadcast of the F-Word and the S-Word in the context at issue here during a nationally televised awards show when children constitute a substantial portion of the viewing audience. Thus, whatever uncertainty might exist at the periphery of an indecency standard, there is no uncertainty about the application of the test in this case.

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). This Court has "relaxed that requirement in the First Amendment context," but only by "permitting plaintiffs to argue that a statute is *overbroad* because it is unclear whether it regulates a substantial amount of protected speech." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008) (emphasis added). Thus, a court considering overbreadth "should evaluate the ambiguous as well as the unambiguous scope of the enactment," *Village of Hoffman Estates*, 455 U.S. at 494 n.6, but other than the role vagueness concerns may play in the overbreadth analysis, vagueness does not provide for the same exception to third-party standing limitations as the overbreadth doctrine. Here, respondents have advanced only a freestanding vagueness challenge, but they have not argued that Section 1464's prohibition on indecency is overbroad. Respondents therefore may not assert a facial vagueness challenge in this case to the indecency regime.

In any event, such a challenge would lack merit because, as several courts of appeals have recognized, the FCC's definition of indecency "is virtually the same defi-

nition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case," so when this Court "h[e]ld the Carlin monologue indecent," it necessarily signaled that it "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (*ACT I*) (citation omitted); see *Dial Info. Servs. Corp. of N.Y.* v. *Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition for Def. of the First Amendment* v. *FCC*, 928 F.2d 866, 874-875 (9th Cir. 1991). Respondents rely on *Reno* v. *ACLU*, 521 U.S. 844 (1997), which invalidated a statute regulating indecency on the Internet. But *Reno* expressly distinguished *Pacifica*, so far from casting doubt on the validity of broadcast-indecency regulation, *Reno* recognizes its continuing validity. See *id.* at 867-868.[3]

3. Respondents also argue (Fox Br. 45-48; NBC Br. 43-47) that availability of the "V-Chip," which permits parents to block certain programming, makes Congress's broadcast-indecency prohibition unconstitutional. That argument is flawed, because regulations of broadcasting are subject only to intermediate scrutiny, under which, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that

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[3] Respondents and their amici relatedly suggest that uncertainty over the definition of indecency will lead to self-censorship. The record does not bear that out. In any event, any threat of self-censorship of the F-Word or S-Word "surely lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743 (plurality opinion); see *id.* at 743 n.18.

the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys., Inc.*, 520 U.S. at 218 (citation omitted). In any event, even under strict scrutiny, the proffered less-restrictive means must be "effective" in furthering the government's goals. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). Here, it is undisputed that the V-chip would not have been effective at all in preventing a child's exposure to the indecent language used by Nicole Richie and Cher. The two broadcasts in question were misrated, so that even a parent with full knowledge of the V-chip and the television rating system who sought to use those tools to shield her child from indecent language would have been unable to do so. Pet. App. 76a-78a & n.47, 119a & n.190.

Respondents have not come close to showing that the V-chip provides a basis for a facial challenge to Section 1464. See *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1190-1191 (2008). Although the V-chip provides parents with "some ability to control their children's access to broadcast programming," the Commission found that that ability is too limited in practice for the technology to serve as an effective alternative to regulation. Pet. App. 109a-110a; see American Acad. of Pediatrics Br. 15-36. Many televisions have no V-chip capability, "and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it." Pet. App. 109a. In addition, misrated programming is common; V-chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.* at 110a n.162 (quoting Dale Kunkel et al., *Deciphering the V-Chip: An Examination of the Television Industry's*

Program Rating Judgments, 52 J. Commc'ns 112, 136 (2002)). Because of those obstacles to effective implementation of its protections, the V-chip (and similar measures) cannot be a less-restrictive alternative.

4. Finally, it bears noting where respondents' constitutional arguments would lead the Court. The logic of respondents' frontal constitutional attack on the regulation of broadcast indecency leads to a regime in which *no* regulation of broadcast indecency is permitted, see ACLU Br. 33-37, such that broadcasters could bombard children with indecent language (fleeting or not) at any point during the day, including when children are most likely to be in the audience. And there is no reason to assume that broadcasters will not take advantage of any opening created by this Court. Indeed, as it stands, respondents' amici argue (ACLU Br. 31) "there is simply not enough time after 10 p.m." for all of the speech that they believe is "endangered" by the Commission's current policy. The First Amendment does not require the government to throw up its hands and give up on protecting the nation's children from the seriously harmful effects of broadcasting indecent material directly into their homes. And there is no reason for the Court to entertain, much less embark on, such a radical constitutional shift in reviewing the court of appeals' ruling in this case (erroneously) finding a violation of the APA.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

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